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In the Supreme Court of the United States

October Term, 1979
No. 78-1729

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK PAYNER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether the District Court properly exercised its Supervisory Power in excluding all evidence obtained as a result of the willful, intentional and outrageous criminal conduct by Government agents.

2. Whether a District Court may suppress under the Due Process Clause of the Fifth Amendment, evidence obtained through the commission of bad faith, willful and knowing criminal acts by Government agents, when the illegal conduct was outrageous and suppression is necessary in order to deter repetition of the criminal conduct.

3. Whether a depositor in a bank chartered in a nation whose laws guarantee the confidentiality of bank records has a reasonable expectation of privacy for those records so as to permit him under the Fourth Amendment to object to the introduction of evidence obtained as a result of the "bad faith", willful and knowing criminal theft of those records by Government agents.

STATEMENT

Respondent accepts the Government's statement of the case with the following additions and corrections:

The involvement of Special Agent Richard Jaffe, of the Internal Revenue Service (hereinafter "IRS"), in the theft of the briefcase, admitted in the Government's Brief, went far beyond the mere authorization and approval of the theft. Jaffe was so involved in the planning of the theft that he provided the locksmith used by Norman Casper to unlock the briefcase so the documents contained therein could be photographed (Petitioner's Appendix F, p. 23a, Tr. 96 and 111). Further, in response to Jaffe's request for additional information, Casper instructed Sybol Kennedy to arrange another "visit" with Michael Wolstencroft, and, while she was in his office, to steal his rolodex file from his desk. This she did (A. 35, Petitioner's Appendix F, p. 24a, Tr. 117-119, 126-129, 160-161).

When Operation Trade Winds first commenced with the use of over 30 informants in 1965 until April or May, 1974, the Government issued no subpoenas, search warrants or administrative IRS summons. This, in spite of the fact that in June, 1972 IRS suspected that Castle Bank in the Bahamas functioned as an illegal tax haven for American taxpayers and that it had an account with the Bank of Perrine in Florida.

However, a little over a year after the "briefcase caper", as it was labeled by the IRS (A. 318), and after a complete analysis of the documents found in the briefcase, a Federal Grand Jury in Florida issued subpoenas for witnesses and documents. As a result, a loan guaranty was produced by the Bank of Perrine allegedly executed by Respondent Payner and dated April 25, 1972 (A. 166). The Government concedes that this guaranty was the key to its case (Petitioner's Brief p. 3). All documents that were introduced, except for Payner's tax returns, were discovered as a direct result of the IRS's planned theft of the subject briefcase in January, 1973. As a further result of said theft, Sam Pierson, former officer of the Perrine Bank, and all other key Government witnesses were called to testify.

The record indicates that Special Agent Richard Jaffe submitted a report on Project Haven to a committee of the United States Congress, in which he referred to the "briefcase caper", stating:

> "The information obtained from the informant was extremely valuable and was unavailable from any other source. It [the information from the briefcase] provided the leads as to where to serve the grand jury subpoenas." (A. 243).

In granting the suppression motion, the District Court found that the Government had not met its burden of showing that the suppressed evidence was not the fruit of its criminal conduct, which conduct the Court labeled as ". . . both purposefully illegal and an intentional, bad faith act of hostility . . .". (Petitioner's Appendix F, p. 62a). The Court said:

> "Viewing Richard Jaffe's testimony as a whole, including his demeanor while presenting his testimony, . . .

[that testimony] . . . was *unconvincing.*" (Petitioner's Appendix F, p. 30a). (Emphasis in original).

The District Court specifically found that:

". . . it was not coincidence that the Perrine Bank was served with subpoenas shortly after information in the briefcase had been examined and discussed throughout the I.R.S. districts in the United States." (*Id.* at p. 31a).

Consequently, the District Court concluded:

"The Court finds that the briefcase seized on January 15, 1973 provided the leads which resulted in the issuance of subpoenas to the Bank of Perrine in April and May, 1974. Further the Court finds that Exhibit 4 [the loan guaranty] is a product of the seizure of January 15, 1973, and that the subsequent investigation and indictment of Jack Payner stemmed from the January 15, 1973 seizure." (*Id.* at p. 32a).

The District Court based its suppression order upon the fact that, because the Government's agents obtained the subject evidence through purposeful and knowing criminal conduct, perpetrated in bad faith hostility to constitutional rights, the use of such evidence at trial violated Respondent's Due Process rights under the Fifth Amendment to the United States Constitution. The Court further held that it had a duty to suppress the subject evidence under its inherent Supervisory Powers. From this Order the Government appealed, and the appeal was dismissed on March 17, 1978 for lack of jurisdiction. *United States v. Payner,* 572 F.2d 144 (6th Cir., 1978).

In the Government's second appeal, the Circuit Court of Appeals affirmed the Order of the District Court, based

upon a finding that the District Court had properly exercised its Supervisory Powers, and stated that it had not been necessary to reach the Constitutional questions raised, i.e. the Fourth Amendment search and seizure and the Fifth Amendment Due Process issues. While not discussing the issue, the Circuit Court affirmed the District Court's finding that the suppressed evidence had been tainted. The District Court's finding had been based upon testimonial evidence and the Government's failure to introduce any evidence to meet its burden of proving an independent source or lack of taint (A. 58, Petitioner's Appendix F, pp. 63a-64a).

SUMMARY OF ARGUMENT

The Court is presented with the issue of whether evidence obtained through the "bad faith", willful and knowing criminal acts of Government agents may be suppressed by a District Court. Respondent contends that the District Court correctly suppressed all evidence obtained as a result of the theft, and was authorized to do so under (1) its traditional, inherent Supervisory Powers; (2) the Due Process Clause of the Fifth Amendment; and/or (3) the Fourth Amendment.

The theft of the subject briefcase by paid Government agents constituted crimes under the statutes of the State of Florida, including that of larceny. A Federal Court has the inherent power to supervise the conduct of the Government in trials before it. Not to have exercised that power in the instant case and, thereby, not to have suppressed the subject evidence would have permitted the violation of the basic integrity of the Federal judicial system. *McNabb v. United States,* 318 U.S. 332 (1943). While Courts sparingly

exercise their inherent Supervisory Powers to suppress evidence, *Lopez v. United States,* 373 U.S. 427, *reh. den.,* 375 U.S. 870 (1963), where Federal agents purposefully commit crimes to obtain evidence for criminal prosecutions, that power can and should be exercised to suppress all fruits of such bad faith criminal acts. This Court and other Courts have from time to time refused to suppress evidence obtained through reprehensible police conduct, however the refusals to suppress were based upon findings that the police conduct fell short of being in bad faith and knowingly illegal. In this case, the Government officers planned the "briefcase caper", knowing it to be criminal with total disregard for the standards of conduct and decency that have been traditional in the American concept of justice. They should not be permitted to reap the benefits of their planned criminal acts.

The Government's argument that the adoption by Congress of Rule 402 of the Federal Rules of Evidence strips from Federal Courts their traditional power to safeguard the standards of justice administered within their courtrooms, has no basis in any of the legislative history of the Federal Rules or elsewhere. Had the District Court been unable to suppress the fruits of the criminal acts of Government agents, it would have been forced to be an accomplice in the Government's scheme. In view of all of the circumstances (which were in essence undisputed), the District Court found the conduct of the Government agents to be so "outrageous" as to require the exercise of its Supervisory Powers to suppress all evidence obtained through their criminal conduct.

While the Circuit Court did not find it necessary to reach the issue, the District Court also properly suppressed all evidence obtained through the criminal acts of Government agents under the Due Process Clause of the Fifth

Amendment of the United States Constitution. Even under the Government's strained and unfounded interpretation of Rule 402 of the Federal Rules of Evidence, Federal Courts unquestionably retain the power to suppress evidence obtained in violation of Constitutional safeguards. The standard for determination as to whether Due Process was violated was that set forth in *Rochin v. California,* 342 U.S. 165, 169 (1952), i.e. whether the bad faith, willful and knowing illegal acts of the Government agents in plotting and executing the "briefcase caper" offended ". . . those canons of decency and fairness which express the notion of justice of English-speaking peoples . . ."

The District Court, having properly found that the use of evidence so obtained violated Due Process standards, correctly applied the balancing test of *United States v. Janis,* 428 U.S. 433 (1976), *reh. den.,* 429 U.S. 874 (1977), and determined that society's interest was far better served by suppressing the fruits of the "briefcase caper" and deterring future "outrageous" conduct on the part of Government than would be served by the admission of such evidence at trial. Without the deterrent of the Exclusionary Rule, Government agents would be free randomly and openly to commit crimes against persons, whom the Government had no intention of prosecuting, in order to obtain evidence against other persons. The Government could then claim, as it is now claiming, that it could use such evidence at trial, and the defendants would have no standing to object. Allowing the Government to benefit from its own intentional illegal activity, fails to meet even the minimum standards of Due Process.

Based upon the recent decision of this Court in *Rakas v. Illinois,* 439 U.S. 128 (1978), an individual may not object to evidence obtained through an illegal search and seizure, unless he had a legitimate expectation of privacy.

However, that expectation of privacy need not be based on a property interest. Since the records of the Castle Bank and Trust Company of the Bahamas, which were stolen by Government agents were confidential under Bahamian law, a depositor in that bank had a legitimate expectation of privacy. The theft of those records by agents of the United States Government directly violated that legitimate expectation of privacy. Accordingly, Respondent, who is accused of having such an account, the alleged existence of which was discovered as a result of criminal acts by Government agents, had his Fourth Amendment rights violated.

Therefore, the District Court possessed adequate authority under its Supervisory Powers, the Due Process Clause of the Fifth Amendment as well as the Fourth Amendment, to suppress the fruits of the illegal acts of Government agents.

ARGUMENT

I. UNDER ITS HISTORIC SUPERVISORY POWERS, CONSISTENT WITH THE RULINGS OF THIS COURT, THE DISTRICT COURT PROPERLY EXCLUDED ALL EVIDENCE OBTAINED AS A RESULT OF THE WILLFUL, INTENTIONAL AND OUTRAGEOUS ILLEGAL CONDUCT ON THE PART OF THE GOVERNMENT AGENTS.

The Government is faced with the task of attempting to create a basis for the admissibility of its evidence which was the fruit of admitted bad faith criminal acts of its agents. Rather than affirmatively asserting some basis for the admission of such evidence, the Government argues that Rule 402 of the Federal Rules of Evidence stripped the Federal Judiciary of its traditional Supervisory Powers to protect judicial integrity and maintain civilized standards in the administration of justice. By offering the fruits of its criminal conduct as evidence, the Government attempted to make the District Court a participant in its criminal activities. Not surprisingly, neither the District Court nor the Court of Appeals would participate in such a perversion of the Judicial System.

The Government predicates its arguments on the assertion that none of Respondent's Constitutional rights were violated by the use of the evidence obtained through a purposeful burglary. This is clearly untrue. The District Court, relying on a long line of authority from this Court (as discussed *infra*), held that Respondent's Due Process rights under the Fifth Amendment were indeed violated both by the criminal conduct of Government

Agents in obtaining the suppressed evidence and also in the use of such evidence at the trial. While the Government also asserts in its Brief that the subject evidence was not tainted, that matter was resolved by the District Court based upon the Government's failure to meet its burden of proof to show lack of taint.[1]

A. The Government's Conduct in Perpetrating the "Briefcase Caper" Was Clearly Illegal.

As the District Court set forth in Footnote 66 of its Opinion below (A. 50, Petitioner's Appendix F, p. 48a),

1. The Government again claims what it failed to prove in the District Court, i.e. that the loan guarantee and other evidence was not tainted. Once the fact of an illegal search and seizure or other illegal action by the authorities has been proven, the Government has the burden of showing that its evidence was not tainted by the illegal search. *Alderman v. United States,* 394 U.S. 165 (1969).

It may do so in two ways: (1) by proving that the evidence was obtained independently of the illegal search, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Nardone v. United States,* 308 U.S. 338 (1939); *Alderman v. United States, supra;* or (2) by demonstrating that the information which led to the discovery of the evidence was so far removed from the illegally seized evidence that the connection became, ". . . so attenuated as to dissipate the taint." *Nardone v. United States, supra* at 341; *Wong Sun v. United States,* 371 U.S. 471 (1963); *Brown v. Illinois,* 422 U.S. 590 (1975). The District Court found, based upon the evidence and the demeanor of the witnesses, that the Government had failed to meet its burden. In particular, the District Court found that the testimony of Special Agent Jaffe was "unconvincing".

Although the Government still contends that the suppressed evidence was not tainted, the Government has already stipulated that such evidence was tainted in another case stemming from the same "investigation", *United States v. Baskes* (No. 77 CR 238, N.D. Ill.), in which it used information from the "briefcase caper" to obtain its evidence and indictment. Paragraph 26 of the Stipulation stated:

> "While the government already knew Castle Bank and Trust had accounts at the American National Bank and the Bank of Perrine, the impetus for these grand jury subpoenae stemmed from the information received from the briefcase."

the actions of the Government operatives[2] in obtaining confidential bank records from the briefcase of Wolstencroft satisfy the elements of a *prima facie* case of criminal larceny under Florida law, Fla. Stat. Ann. §§812.011, 812.021(1)(a) Fla. Stat. Ann. and 812.021(5) Fla. Stat. Ann. and Special Agent Jaffe himself was guilty as a "principal". Fla. Stat. Ann. §777.011.

The District Court further noted that:

> "The type of conduct which the government agents exhibited in connection with the 'briefcase caper' was so outrageous and improper that it probably satisfies the elements of F.S.A. Section 812.081 criminalizing the unauthorized appropriation of trade secrets, such as secret 'lists of customers' by copying such list without permission of the owner. See Section 812.081 (1)(c), (3)." (A. 50, n.66, Petitioner's Appendix F, p. 48a).

That section carries a different penalty from that of larceny and is an independent crime.

B. A Federal District Court Has Inherent Supervisory Powers to Refuse to Accept Evidence Which Is the Fruit of Bad Faith Criminal Conduct by Government Agents.

In considering this case, it must not be forgotten that this is not an instance of a mere good faith technical procedural violation. Rather, the suppressed evidence was the fruit of carefully planned and intentional criminal conduct by Government agents, the admitted purpose of which was to acquire evidence to use against persons such

2. Casper's actions were for the benefit of the IRS and he was hired by and was paid $8,000.00 for his efforts by Jaffe, an employee of the IRS (A. 317).

as the Respondent, under the belief that such persons would not have standing to object to the criminal conduct. This case presents nothing new to this Court, as it is merely an example of a Federal Court's exercising its duty to exclude evidence which the Government obtained in a manner inconsistent with the American standard of justice. If there is anything novel in this case, it is the extent and scope of the Government's illegal conduct. For the Court not to have exercised that power would have permitted the violation of the basic integrity of the Federal system of justice. In *McNabb v. United States, supra* at 339-340, the Court stated:

> "It is true, as the petitioners assert, that a conviction in the Federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."
>
> * * * * *
>
> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The Trial Court properly determined that the conduct of the Government in the "briefcase caper" was ". . . purposefully illegal and an intentional bad faith act of hostility . . ." (A. 57, Petitioner's Appendix F, p. 62a). The Government agents intentionally violated the law, because they believed that the intended targets of their illegal conduct would have no redress, since such persons would

lack standing to claim any Fourth Amendment violation.[3] That is precisely the position now asserted by the Government. The result of that belief, the illegal conduct, stands as the best evidence of the fallacy of that position.

It has been a long-recognized duty of Federal Judges to take whatever action is necessary, including the imposition of the Exclusionary Rule, to prevent the Federal Courts from being demeaned, through their use as a forum, to sanction lawlessness on the part of law enforcement officers. The exclusion of the evidence in question was the least that could be done to maintain the integrity of the judicial process.[4] The best reason for asserting traditional Supervisory Powers asserted by this Court in *Mapp v. Ohio,* 367 U.S. 643, at 659 (1961) is that:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The need to exclude evidence resulting from Government illegality was recognized recently by this Court in *Dunaway v. New York,* 47 U.S.L.W. 4635, 4640 (June 5, 1979) both for deterrent and integrity reasons: ". . . not only is exclusion of the evidence more likely to deter police mis-

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3. This is exactly the type of conduct that Mr. Justice White, joined by Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Stevens, in their dissent in *Rakas v. Illinois, supra,* feared might result in Fourth Amendment cases from a rigid and narrow application of standing requirements to automobile search cases.

4. The Government has specifically stated in prior Briefs and implies in its current Brief that while it asserts that Rule 402 deprives a Federal Court of its Supervisory Power to suppress evidence, the Federal Courts retain their Supervisory Powers to dismiss indictments. What the Government has argued is that, in effect, the Courts may use a meat cleaver approach and dismiss indictments to protect the dignity of the Courts and to deter improper or illegal government conduct, but may not use the much more limited remedy of the scalpel to suppress and surgically remove the offensive evidence. That position makes no legal sense.

conduct in the future, but use of the evidence is more likely to compromise the integrity of the courts."[5]

The recent decision of *United States v. Valencia,* 541 F.2d 618 (6th Cir., 1976), exemplified the duty of a Federal Court to protect the integrity of the Federal judicial system by excluding evidence obtained in a manner which would taint that system.

In *Valencia,* a secretary to an attorney who was representing co-defendants of the movant passed confidential memoranda and other information to Federal officers. The Sixth Circuit held that any evidence which was the fruit of such grossly improper conduct, in violation of the attorney-client privilege, and which resulted in prejudice to the defendants, must be excluded under the Court's Supervisory Power. In *Valencia,* all fruits of such conduct were held to be inadmissible, *even though the attorney-client privilege which was violated was not the privilege of the parties seeking suppression.* The Court properly disregarded the fact that the privilege violated was not personal to the movants and remanded the case to the District Court to determine, specifically, which evidence was the fruit of the Government's improper conduct.

The case at bar presents an even stronger case for suppression than did *Valencia.* In *Valencia,* the only improper conduct by Government officials, outrageous as it was, was to induce a secretary to breach her employer's attorney-client privilege. In the case at Bar, Federal agents actually conspired to and did commit numerous crimes in

5. See also, *Brown v. Illinois, supra; Ker v. California,* 374 U.S. 23 (1963); *Lopez v. United States, supra; Elkins v. United States,* 364 U.S. 206 (1960); *Benanti v. United States,* 355 U.S. 96 (1957); *Mallory v. United States,* 354 U.S. 449 (1957); *Communist Party v. Subversive Activities Con. Bd.,* 351 U.S. 115 (1956); *Mesarosh v. United States,* 352 U.S. 1 (1956); *Nardone v. United States, supra.*

utter disregard of State and Federal law, knowing such conduct to be illegal, but with the misguided belief that the evidence that they obtained would not be subject to challenge. The instant case presents, in fact, the ultimate case, save and except possibly for evidence obtained as a result of a planned murder by Government agents.

C. Rule 402 of the Federal Rules of Evidence Does Not Strip the Federal Judiciary of Its Inherent Supervisory Powers.

Rather than affirmatively attempting to justify the admission of the fruits of the theft, the Government devotes the major portion of its Brief to an argument asserting that as a result of the enactment of the Federal Rules of Evidence and in particular Rule 402, the District Court lost its traditional Supervisory Power to suppress such evidence. Rule 402 provides:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

The Government asserts that Rule 402 lists the only instances where a District Court may suppress evidence, and therefore, the Trial Court should not have suppressed the fruits of the theft under its Supervisory Powers.

The legislative history of Rule 402 lends no support to the Government's theory. As originally proposed by the Supreme Court, Rule 402 provided:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States,

by act of Congress, by these rules, or by other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."

Congress amended the Rule to its current form by replacing "adopted by the Supreme Court" with "prescribed by the Supreme Court pursuant to statutory authority". The amendment was made "[t]o accommodate the view that Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence." Report of the Committee on the Judiciary, 93 Cong., 1st Sess., Report No. 93-650 (Nov. 15, 1973) p. 7.

The testimony of Professor Richard H. Field was cited by the Government in their Brief at p. 30 in support of the position that Rule 402 eliminated the Supervisory Power to suppress evidence. However, a full reading of that testimony demonstrates that the traditional Supervisory Power of a Court to suppress evidence on a case by case basis was assumed to be unchanged by Rule 402:

> "*Rule 402.* I approve the principle which led the Subcommittee to change 'adopted' to 'prescribed' by the Supreme Court pursuant to statutory authority. The Subcommittee wishes neither to acquiesce in nor negate the authority of the Court to promulgate Rules of Evidence. This desired neutrality would, I think, be better achieved if the words were 'lawfully prescribed by the Supreme Court.' It is at least arguable that *since the Court has inherent power as part of the judicial power to make rules of evidence on a case-by-case basis,* it has the power to establish generally applicable rules of evidence, so long as they do not conflict with a statute and subject always to being altered or voided by an Act of Congress. The Advisory Committee and the Judicial Conference relied upon the Enabling Act, 28 U.S.C. § 2072, as authority for promulgating rules of evidence, and all the justices of the Supreme Court except Justice Douglas agreed with this approach, but I see no useful purpose in trying to foreclose the argument for inherent power." Hearings before the Special Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Reps., 93rd Cong., 1st Sess., on Proposed Rules of Evidence, Serial No. 2, p. 269 (Supp. 1973). (Emphasis supplied).

Clearly, the purpose of the change in the rule did not relate to the Supreme Court's or a lower Court's inherent power to refuse to accept evidence on a case by case basis when necessary to protect the integrity of the Court. What Congress was attempting to do was maintain the status quo and prevent an interpretation of Rule 402 which would permit the Supreme Court to adopt a new statutory rule of evidence or procedure without following the procedure of the Enabling Acts. Consequently, Congress amended Rule 402 to maintain the existing Enabling Acts' procedure, so that the Supreme Court could not amend an existing statutory rule of criminal procedure or evidence without that amendment first being approved, ratified or at least reviewed by Congress pursuant to current authority.

The Government's Brief fails to recognize that the District Court did not prescribe a general rule of evidence, but rather suppressed evidence in a specific case as the evidence had been obtained by the Government knowingly and purposefully with bad faith hostility towards the strictures imposed on their activities by the Constitution. The policies which dictate exclusion have very different objectives from the administrative policies underlying the prescription of general rules of evidence. Professor Weinstein correctly points out that "Rule 402 makes no attempt

to enunciate the underlying policies which dictate exclusion." WEINSTEIN'S EVIDENCE, §402[01], p. 402-8 (1978). However, one function of exclusionary rules ". . . limits admissibility in order to implement some extrinsic policy which the law considers more important than ascertaining the truth in a particular lawsuit." *Id.* Under that function, ". . . relevant evidence may be excluded to strengthen the judicial system." *Id.* at p. 402-12.

The argument that Rule 402 eliminates the Supervisory Power to suppress evidence was made by the Government previously and was strongly rejected. *United States v. Jacobs,* 547 F.2d 772, 777 (2d Cir., 1976), *cert. dismissed as improvidently granted,* 436 U.S. 31 (1978). The issue discussed was the admissibility of particular statements made to a grand jury. The Second Circuit stated:

> ". . . the Government takes the extreme position that by Rule 402 of the Federal Rules of Evidence (a Congressional enactment) relevant evidence is to be excluded solely in those cases where exclusion is required 'by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court, pursuant to statutory authority.' It offers no history to support the view that Congress was concerning itself with the supervisory powers of the federal courts. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent."

The Second Circuit clearly and properly interpreted Rule 402 as providing no basis to strip from the Federal Judiciary its historic power to supervise the Federal Judicial process by excluding evidence obtained in a manner that a Federal Court deems to be so grossly improper as to be a threat to the integrity of the entire Federal Judicial System. The Government goes to great lengths to cite

case precedent for the right of Congress to prescribe Rules of Evidence and legislative history of the Rules to demonstrate the intent of Congress to abrogate, in most instances, common law rules of evidence and establish uniformity among the federal courts. The Government, however, failed to cite any case or legislative history in support of its interpretation of Rule 402. So far as Respondent is aware, there is no case or legislative history to support the Government's proposition that the judiciary has been deprived of its traditional Supervisory Powers to prevent the use of the Federal Courts as a forum for evidence obtained through willful and bad faith criminal conduct.

Numerous courts have suppressed evidence, reversed convictions, remanded for sentencing or taken other action premised on the Court's Supervisory Powers. See e.g., *Elkins v. United States, supra* (suppression of evidence); *Yates v. United States,* 356 U.S. 363 (1958) (sentencing); *Mallory v. United States, supra* (suppression of evidence); *McNabb v. United States, supra* (suppression of evidence). This Court has even recognized its own Supervisory Powers and dismissed an indictment noting that the defendant need not have shown any prejudice because according to the Court, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States,* 329 U.S. 187, 195 (1946).

To accept the Government's position on Federal Rule 402 would implicitly overrule *Mallory* and *Elkins* and strip from the Federal Judiciary one of the most important of the Checks and Balances in our federal system. The Government's position would require the Courts to sanction the criminal conduct of Government agents, and permit the Government to benefit from its illegal behavior. To do so would be tantamount to requiring the Federal

Judiciary to actively participate in the bad faith criminal conduct of the Government and its agents. It is inconceivable that Congress would have eliminated a traditional and necessary power of the Federal Courts without some comment, let alone without a careful discussion and analysis.

The Government neither claims "good faith" nor denies that the acts of its agents were not only illegal, but purposefully and knowingly criminal. Rather than attempt to justify its activities, the Government asserts that there is no remedy available to the Respondent. It is precisely to prevent the growth and development of this callous and lawless attitude on the part of our Government that Courts exercise their Supervisory Powers.

D. The Bad Faith Commission of Crimes by Government Agents Is So Egregious As to Require a District Court to Exercise Its Supervisory Powers.

The Government in its Brief attempts to persuade this Court that there can be no excesses committed by federal agents justifying a District Court's use of its Supervisory Powers. None of the authorities relied upon by the Government, however, contained facts which remotely resembled the facts in the instant case. None of the cases cited and relied on by the Government involved the Government's willingness to circumvent constitutional safeguards coupled with a purposeful, intentional violation of criminal statutes as was so evident in the instant case.

In *Lopez v. United States, supra,* this Court did state, as the Government cites in its Brief, that:

> ". . . the Court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised." *Id.* at 440.

However, in the very next sentence, this Court went on to state:

> "Its application in the present case, *where there has been no manifestly improper conduct by federal officials,* would be wholly unwarranted." *Id.* (Emphasis added).

In the instant case, the District Court, following the criteria of *Lopez,* and based upon the evidence before it, made a specific finding that the actions of the federal agents were not merely "manifestly improper", but were "outrageous" and knowingly "illegal,"[6] unlike *Lopez* where there was ". . . no act of any kind which could justify the creation of an exclusionary rule."

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6. The District Court also found that:

". . . the Government's action in this case was both purposefully illegal and an intentional, bad faith act of hostility . . ." (A. 57, Petitioner's Appendix F, p. 62a).

. . . .

". . . the United States . . . knowingly and willfully participated in the *unlawful* seizure . . . (A. 36, Petitioner's Appendix F, p. 25a). (Emphasis added).

. . . .

". . . the United States was an active participant in the admittedly criminal conduct . . ." (A. 37, Petitioner's Appendix F, p. 26a).

. . . .

". . . the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution. (A. 50, Petitioner's Appendix F, p. 48a). (Emphasis in original).

. . . .

"The Activities of the Government agents [were] . . . outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all like-minded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country . . . (A. 51, Petitioner's Appendix F, p. 50a).

. . . .

"The need to deter gross illegal activity on the part of the Government, such as occurred in this case, is clear." *Id.*

In *United States v. Leja,* 563 F.2d 244 (6th Cir., 1977), relied upon by the Government in its Brief, the Sixth Circuit Court of Appeals held that *where no precise violation of any penal statute by officers in question was shown* (unlike the instant case where federal officers and agents specifically and intentionally violated Florida criminal statutes), even though defendants could not have obtained sources of supply and information without the assistance of Government agents, given their established predisposition to go into the drug-making business, governmental participation in the manufacture of Phencyclidin did not offend concepts of fairness as to justify the extraordinary employment of judicial power to curb it.

On appeal, defendants contended that the Government's involvement in the entire illicit operation was so excessive as to violate Due Process as a matter of law or to warrant reversal under the supervisory jurisdiction over the judicial system. The defendants relied on the view of five justices in *Hampton v. United States,* 425 U.S. 484 (1976) who had indicated that overinvolvement of Government agents in criminal offenses might be so egregious as to violate Due Process and to warrant reversal under the Court's supervisory powers. Mr. Justice Rehnquist, however, speaking for a plurality in *Hampton,* stated that Due Process would not be offended by such conduct and it would never be appropriate to use Supervisory Powers *in such situations.*

Mr. Justice Powell and Mr. Justice Blackmun concurred in the judgment but declined to join in a *per se* rule. They foresaw the issue of this case, and used the term "outrageous police conduct" to describe instances where a District Court should exercise its Supervisory Powers. In Footnote 6, of his concurring Opinion, Mr. Justice Powell observed that an analysis of the appropriate use

of Supervisory Powers is like an analysis under the Due Process Clause, where the test is fundamental fairness under the circumstances. *Rochin v. California, supra.* Actually, the instant case provides a more compelling case for the exercise of Supervisory Powers than that foreseen by Mr. Justice Powell in *Hampton.* Here the Government agents were the planners and sole perpetrators of the criminal acts, rather than engaging in ". . . illegal activity in concert with a defendant . . ." *Hampton v. United States, supra* at 490.

In light of *Hampton,* the Sixth Circuit Court of Appeals in *Leja* did not believe that the Government activity so offended its concept of fundamental fairness as to justify the extraordinary employment of judicial power to curb it. Therefore, the conviction was affirmed. The Sixth Circuit Court, however, while acknowledging that the traditional area for exercising Supervisory Powers has been within the framework of judicial proceedings, stated:

> "Like Judge Friendly in *United States v. Archer* [486 F.2d 670 (2nd Cir., 1973)], and like Justice Powell in *Hampton,* supra, we determine never to say 'never' as long as the potential for abuse of individual rights exists in governmental action." 563 F.2d at 247.

Judge Rubin, in his dissenting opinion in *Leja,* stated:

> "It is clear from the concurrence and majority opinions in *Hampton v. United States,* that a majority of the United States Supreme Court recognized that there may be a level of egregious governmental participation in criminal activity that is proscribed, no matter how worthy the objective or how deceitful the adversary."

That level was clearly reached and surpassed in the instant case.

E. The District Court Properly Exercised Its Supervisory Powers to Prevent a Repetition of the Government's "Outrageous" and "Bad Faith" Conduct.

The Government next argues that even if the Courts retained any of their Supervisory Powers to suppress evidence after the adoption of Rule 402, they should not be employed to regulate the investigatory arm of the Government so long as no statute, rule or Constitutional provision has been violated. First, as held by the District Court and discussed in the following portion of this Brief, both the Government's investigatory conduct and the use of the fruits of that conduct clearly violated Respondent's Due Process rights under the Fifth Amendment. Second, while rejected by the District Court, and not necessary for this Court to reach in order to affirm the Judgments below, the last portion of this Brief clearly demonstrates that Respondent's Fourth Amendment rights were also violated.

The Government's own Brief supplies some of the most cogent reasons for affirming the Judgments of the Courts below. At page 41 of its Brief, the Government states:

> "What one commentator said in 1965 remains true today: 'Supervisory power has not yet been invoked to exclude evidence obtained through the use of reprehensible police methods *which fall short of illegal conduct.*' Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. J. 1050, 1067 (1965). See also Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656, 1664 (1963) ('Evidence obtained by police action which can be characterized as unfair but *which is not, strictly speaking, illegal* has not yet been excluded under the aegis of the supervisory power')." (Emphasis added).

Respondent accepts the Government's position as quoted above. What directly follows from this proposition, however, is that when Government Agents obtain evidence through "illegal conduct" a District Court may exclude that evidence under its Supervisory Powers.

The Government asserts at page 46, footnote 17 of its Brief that there was no need for the District Court to exercise its Supervisory Powers in the instant case, because the IRS has instituted guidelines requiring that informants be instructed not to violate the law and to report such violations to local authorities. Those guidelines, however, were instituted long after the briefcase caper, and while the Motion to Suppress in this case was pending. Clearly, it was the threat of suppression that motivated the Rule by the IRS.

If this Court were to hold that evidence obtained through knowing criminal conduct was admissible, what assurance is there that the IRS would not either change or ignore its Rules and plan another "briefcase caper". This concern is more than an "imaginary horrible," since the mere violation of an IRS regulation by its agents has been recently held by this Court not to be the basis for suppression of evidence unless a Constitutional right is violated. *United States v. Caceres*, 99 S. Ct. 1465 (1979). The deterrent of suppression is the public's only real source of protection from the repetition of such willful and criminal conduct. Further, the Government's scheme in committing the "briefcase caper" should not be permitted to succeed merely by the Government stating that it does not intend to commit such illegal acts in the future.

Finally, the Government claims that this Court ought to reverse, because even if the District Court retained its Supervisory Powers, neither its decision nor the decision of the Court of Appeals set sufficiently rigid standards for

the exercise of those powers. As recognized by Mr. Justice Powell in *Hampton v. United States, supra* at 494, n.6:

> "The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances."

Each case must be judged ". . . in light of all the circumstances." *Id.* That is exactly what the District Court did and why the Court of Appeals found it unnecessary to comment further.

The District Court did not exercise its Supervisory Powers randomly. Rather, it carefully reviewed the facts and found that:

(1) The theft of the briefcase and rolodex were carefully planned and approved by high ranking IRS personnel (Petitioner's Appendix F, pp. 21a-22a, 26a).

(2) The Government agents knew the subject acts were knowingly and purposefully illegal (Petitioner's Appendix F, p. 50a).

(3) The thefts were specifically committed to obtain evidence used at trials like the one below.

(4) The Government counselled its agents ". . . to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . ." (Petitioner's Appendix F, pp. 54a-55a).

(5) Suppression of the fruits of the "briefcase caper" was necessary to prevent repetition of such "outrageous" conduct (Petitioner's Appendix F, p. 56a).

Clearly, the District Court exercised its Supervisory Powers in the traditionally recognized context to protect the integrity of the Court and to prevent the admission of evidence ". . . when the Government's procedure in obtaining evidence is purposefully illegal or the procedure is a known and purposeful act, performed with a bad faith hostility to an individual's constitutional right . . ." (Petitioner's Appendix F, p. 62a).

II. EVEN WITHOUT CONSIDERATION OF THE TRIAL COURT'S SUPERVISORY POWERS, EVIDENCE OBTAINED THROUGH THE WILLFUL COMMISSION OF CRIMES BY GOVERNMENT AGENTS WAS PROPERLY SUPPRESSED BY THE TRIAL COURT IN ORDER TO PROTECT RESPONDENT'S DUE PROCESS RIGHTS.

A. The Government's "Bad Faith Hostility" to the Legal Process in Perpetrating the "Briefcase Caper" Resulted in a Clear Violation of Respondent's Due Process Rights.

Although the Circuit Court did not reach the issue, Respondent deems it appropriate to note that, even if the District Court had not suppressed the tainted evidence on the basis of its Supervisory Powers, it properly suppressed that evidence pursuant to the Due Process Clause of the Fifth Amendment.[7] In arguing that Rule 402 barred the Trial Court from suppressing the subject evidence, the Government seems to ignore that the Trial Court held that the use at trial of the fruits of the outrageous and criminal acts of Government agents violated the Respondent's Due Process rights. By its terms, Rule 402 authorizes a District Court to suppress evidence, the use of which would be contrary to the Constitution of the United States. The

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7. As recognized by Mr. Justice Powell in *Hampton, supra,* the analysis of suppression under the Court's Supervisory Powers follows in the same manner as the analysis under the Due Process Clause.

Advisory Committee in its Note specifically recognized that the Rules left with the Courts the power and responsibility to exclude evidence based upon constitutional considerations:

> "The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)." 56 F.R.D. 218. See also, 10 MOORE'S FEDERAL PRACTICE, §402.03[1], p. iv-59 (1979).

The clear precedent for the exclusion by the Trial Court of all evidence derived from the Government's illegal conduct pursuant to the Due Process Clause of the Fifth Amendment follows directly from *Rochin v. California, supra.*[8] The pivotal issue is whether the Government

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8. The words of Mr. Justice Frankfurter were quoted by the Trial Court as the basis for its decision:

> "Regard for the requirements of Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty'.
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> . . . .

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agents acted illegally and whether such illegality offended ". . . those canons of decency and fairness which express the notion of justice of English speaking peoples even toward those charged with the most heinous offenses . . .", *Id.* at 169.[9]

While the District Court herein recognized that a mere technical violation of the law or conduct committed in good faith, which subsequently proves to be illegal, is not a basis for exclusion of evidence based upon Due Process grounds, *Brown v. Illinois, supra* (Justice Powell concurring); *Brewer v. Williams,* 430 U.S. 387 (1977) (C. J. Burger, dissenting), *reh. den.,* 431 U.S. 925 (1977), the District Court properly held that where the Government's illegal

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Footnote continued—

> Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." 342 U.S. at 169, 172. (Citations omitted).

9. In *United States v. Russell,* 411 U.S. 423 (1973), a Government undercover agent provided a chemical to a defendant who used it to manufacture illegal drugs. The Supreme Court, in finding that *the Government had done nothing illegal,* and had not infringed upon the Due Process Clause, refused to dismiss the indictment. However, the Court specifically stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-432.

conduct was done knowingly and purposefully in "bad faith hostility" to any person's fundamental rights then society has a strong interest in excluding such evidence in order to deter repetition of such outrageous conduct. The use of such evidence approaches—if it does not fully reach—the concept of "trial by force" that is the antithesis of Due Process of Law.

B. In Order to Give Meaning to Respondent's Due Process Rights and to Deter Future Outrageous and Purposefully Illegal Conduct by the Government All Evidence Illegally Obtained Was Properly Suppressed.

In *United States v. Janis, supra,* this Court enunciated the balancing test which must be applied in invoking the Exclusionary Rule. The Court stated that evidence should be excluded when there is a showing that there exists, " 'a sufficient likelihood of deterring the [unlawful] conduct of the State [Federal] police so that it [the social benefit of exclusion] outweighed the societal costs imposed by the exclusion'." The District Court quite correctly applying the *Janis* test found that:

> ". . . [S]ociety's interest in deterring Due Process violations outweighs society's interest in allowing the fact finder to view all relevant evidence only when an official's conduct demonstrates a bad faith hostility to the strictures imposed on him by the Constitution." (A. 49, Petitioner's Appendix F, p. 46a).

This District Court concluded that:

> "The activities of the Government agents Jaffe and Casper were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all like-minded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."[10] (A. 51, Petitioner's Appendix F, p. 50a).

The suppression of any evidence derived from the "briefcase caper" is mandated by the need to deter such grossly illegal activity on the part of the Government. As Mr. Justice Brandeis stated in *Olmstead v. United States,* 277 U.S. 438, 485 (1927):

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means —to declare that the government may commit crimes in order to secure the conviction of a private criminal —would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

This Court stated with regard to the Exclusionary Rule's deterrence rationale:

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10. See also, *Elkins v. United States, supra,* 217, 222 (1960); *United States v. Peltier,* 422 U.S. 531, 537-538 (1975); *United States v. Janis, supra,* 466; *Mapp v. Ohio, supra,* 659; *Brown v. Illinois, supra,* 599.

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkkins, supra,* 217.

The Government argues that the clear Fifth Amendment violations cannot be raised unless Respondent's Fourth Amendment rights were also violated. That position has been laid to rest by this Court. In *Dunaway v. New York, supra,* at 4640, this Court stated:

". . . *Brown v. Illinois, supra,* settled that '[t]he exclusionary rule . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth' 422 U.S., at 601 . . ."

* * * * *

"Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached."

Finally, in expressing the same policy which must be applied in the case at bar, Mr. Justice Brennan concluded:

"To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the "procedural safegards" [Miranda warnings] of the Fifth.'" *Id.*

The District Court here found that it was clear from the testimony that the only practical way to deter the type of conduct engaged in by Jaffe and Casper on behalf of the Government would be to suppress the evidence that was so obtained (A. 54). One of the most disturbing facts in this case is that both before and after the "briefcase caper"

IRS agents openly discussed and believed that persons whose names were obtained from Wolstencroft's briefcase could not attack the illegal search (A. 363-366). Because they were secure in such belief, the Government Agents engaged in illegal activity. Consequently, suppressing the evidence so obtained will be directly responsible for deterring such conduct in the future.

Mindful of such considerations, the District Court correctly applied the rationale of *Michigan v. Tucker,* 417 U.S. 433, 447 (1974), in stating that among the reasons for applying the Exclusionary Rule in this case was ". . . to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."

The callous attitude of those federal officers involved in planning the "briefcase caper", based upon the belief that their intentional and knowing illegal conduct would not in any way affect the admissibility of evidence obtained, is exactly the attitude that Mr. Justice Frankfurter in *Rochin* sought to eliminate. Since, according to the Government's view, the only person who would have any standing to contest the admissibility of evidence derived from the "briefcase caper" was Wolstencroft, and since at the time of the "caper" the Government had no intention of taking any action against Wolstencroft, without the suppression of such evidence, there would be no deterrent whatsoever to repeated criminal actions on the part of IRS and other Government agencies.[11]

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11. The District Court determined from the record as constituted, that the IRS possessed sufficient information regarding the use, by one Allan Palmer, of the Castle Bank to hide illegal income, combined with information from Casper, that Wolstencroft would be entering the United States with Castle Bank depositors' records, to obtain a valid search warrant for those records (A. 40,

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Without the deterrent of the Exclusionary Rule under the Fifth Amendment, Due Process Clause (and under the Court's inherent Supervisory Powers) Government agents would be free randomly and openly to commit gross criminal violations against persons, whom the Government has no intention of prosecuting, in order to obtain evidence against persons who would have no standing to challenge such evidence. In a nation of laws, the Government cannot be permitted to recklessly disregard the rights of individuals. Laws govern all persons, Government agents as well as private citizens. Without the limitations applied by the Exclusionary Rule, as consistently approved by this Court, reprehensible conduct would be repeated over and over again, thereby allowing our Government, whose prime responsibility is the protection of the rights of its citizens, to become the prime violator of those rights.

III. RESPONDENT HAD STANDING UNDER THE FOURTH AMENDMENT TO OBJECT TO THE INTRODUCTION OF ANY EVIDENCE RESULTING FROM THE "BAD FAITH" CRIMINAL CONDUCT OF GOVERNMENT AGENTS.

The District Court had solid authority for its suppression of the subject evidence, based upon its Supervisory Powers and the violation of Respondent's Fifth Amendment Due Process rights. The Government argues, however, that suppression was improper since it claims that Respondent lacked standing under the Fourth Amendment to object to the fruits of the "briefcase caper". Even though

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Footnote continued—
n.55, Petitioner's Appendix F, p. 31). *United States v. Manufacturers National Bank of Detroit*, 536 F.2d 699 (6th Cir., 1976), *cert. den.*, 429 U.S. 1039 (1977). Therefore, *not only was the conduct of the Government agents willful, intentionally illegal and a clearly outrageous violation of the American concept of justice, but it was totally unnecessary.*

there is ample authority for suppression, as hereinbefore discussed, without considering the Fourth Amendment, since the Government has raised the issue of Respondent's Fourth Amendment rights, Respondent will discuss them.

The Fourth Amendment guarantees to the individual the right to be free from unreasonable searches and seizures. This Court has enforced those rights by excluding from consideration at trial against the person whose reasonable expectation of privacy had been invaded, all evidence obtained by an illegal search or seizure. *Mapp v. Ohio, supra; Alderman v. United States, supra.*

This Court has developed a threefold test to be applied in determining whether evidence may be suppressed under the Fourth Amendment. First, the evidence in question must be the product or fruit of an unconstitutional search or seizure, *Weeks v. United States*, 235 U.S. 697 (1914). Second, the unlawful search or seizure must have been conducted by the Government or its agents. *Burdeau v. McDowell*, 256 U.S. 465 (1921). And third, the party objecting to the introduction of such evidence must have standing to object. Specifically, the moving party must be the party whose privacy interests were violated. *Alderman v. United States, supra.*

The satisfaction of the first two criteria in this case is unquestionable. The Government openly, and with callous disregard for the rights of the Defendant and the integrity of the Federal Judicial System, has consistently admitted the intentional and illegal theft of the briefcase. There is not even a claim of good faith. In fact, its agents boasted and gloated over the illegality of the search and seizure of Wolstencroft's briefcase. The District Court found, however, that Defendant Payner had no standing under the Fourth Amendment to raise the illegality of the seizure of Wolstencroft's briefcase. The Trial Court determined that

it was not Payner's Fourth Amendment rights that were violated, but those of Wolstencroft and applying the balancing test of *United States v. Janis, supra,* the interest of society in obtaining such evidence was not outweighed by the deterrent effect upon Government officers.

Respondent asserts that the District Court erred on both aspects of its determination as to lack of standing. It was Respondent's expectation of privacy that was violated and society's interest in deterring such Government misconduct far outweighs the need for such evidence.

It is clear from the record that Wolstencroft was not the intended target of the illegal search and seizure of his briefcase. The purpose of the theft of the briefcase and the materials contained therein was to obtain copies of bank records which were confidential under the banking laws of the Bahamas. The Statute Law of the Bahama Islands (1789-1915), The Banks Act; Chapter 96.9 (1909).[12]

Indisputably Respondent was one of the class of persons against whom the "briefcase caper" was directed. The Trial Court found that Payner, not Wolstencroft, was the object of the Government's outrageous conduct. Payner, not Wolstencroft, was one of the intended victims of the Government's illegalities. While the District Court did not find that the Government knew specifically that it was purloining materials relating to taxpayer Payner, the Government was cognizant that it was stealing documents relating to heretofore unknown taxpayers *such as Payner.*

12. "A bank shall from time to time, if required by the Governor, furnish to the Governor a special return and such further information as the Governor may reasonably see fit to call for:

Provided that the bank shall not, nor shall anything herein contained be construed to authorize a bank to, make known the private account or accounts of any person whatever having dealings with the bank."

Consequently, it was Payner and other yet unknown taxpayers, not Wolstencroft, who were the parties aggrieved by the Government's willful scheme[13] of multiple illegalities.

The District Court looked to cases such as *Brown v. United States,* 411 U.S. 223 (1973); *United States v. Dionisio,* 410 U.S. 1 (1973); *Alderman v. United States, supra; United States v. Hunter, et al.,* 550 F.2d 1066 (6th Cir., 1977), which clearly enunciated the established doctrine that only persons whose "expectation of privacy" was violated by the illegal search can object to the introduction of evidence obtained from that search. The District Court held that since Payner was not the physical subject of the illegal search, i.e. that it was not his briefcase that was stolen and opened by Government agents, he had no standing to object to that search.

Respondent asserts that the "briefcase caper" was unlike the above cited cases where the victim of the illegal search was the person against whom the search was directed, but during the course of search, the Government also obtained evidence against a second party. The Courts have consistently held that the second party, who is not the intended victim of the search, may not challenge the legality of that search. The question presented in the case currently before the Court is quite different. The person whose physical property was violated was not the one against whom a technically improper search was directed. Rather, the Government committed a willful theft of confidential bank records in the possession of a bank employee to use against the depositors named in those records. Such records were legally confidential under the

13. Even if the Government's current Brief before this Court, it still refers to the entire matter as "Casper's scheme" and gloats that it "worked successfully" (Petitioner's Brief, p. 5).

laws of the nation of incorporation of the Castle Bank and Trust Company of the Bahamas.[14] Accordingly, those records were subject to said depositors' reasonable expectation of privacy.

As was stated in *Katz v. United States,* 389 U.S. 347, 351 (1967), ". . . the Fourth Amendment protects people, not places. . .", 389 U.S. at 351, and ". . . what he [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Defendant Payner clearly had a reasonable expectation that the United States Government would not violate the laws of the Bahamas by stealing his confidential bank records. See also, *Camara v. Municipal Court of San Francisco,* 387 U.S. 523 (1967).

The Government asserts that *Rakas v. Illinois, supra,* bars Respondent from raising not only the Fourth Amendment violations, but also the Fifth Amendment Due Process issues. As previously demonstrated, the standards and considerations under the Fifth and Fourth Amendments are totally separate from each other.[15] Further, the facts of the instant case could not be more different. *Rakas* involved a "good faith" stop and search of an automobile by the police. The instant case involves the "bad faith" commission of criminal acts by Government agents. In *Rakas,* the owner of the vehicle was one of the targets of the search and had standing to object. In the case at bar, the Government agents sought specifically to secure evidence against persons such as Respondent, not against the physical victim, Wolstencroft.

In any event, Mr. Justice Rehnquist in *Rakas* held that merely being a "target" of an illegal search did not

14. See Note 12.
15. *Supra,* p. 32.

violate a defendant's Fourth Amendment rights, as had been implied in *Jones v. United States,* 362 U.S. 257 (1960), but rather, Fourth Amendment rights arise only where the illegal search violated a *legitimate* expectation of privacy. Specifically, Mr. Justice Rehnquist held that a passenger in an automobile did not possess a legitimate expectation of privacy with respect to anything transported in that automobile. However, Mr. Justice Rehnquist recognized the right of a non-owner to assert a Fourth Amendment violation if he had such a "legitimate expectation of privacy", and stated:

> "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries,* Book II, Ch. I, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Rakas v. Illinois, supra* at 143, n.12.

See, Note, *The Supreme Court, 1978 Term,* 93 HARV. L. REV. 1, at pp. 171-180 (1979).

Mr. Justice Powell in his concurring opinion stated that in determining a legitimate expectation of privacy, ". . . no single factor invariably will be determinative." *Rakas v. Illinois, supra* at 152. Clearly, no expectation of privacy could be more legitimate than the expectation

of the privacy of bank records mandated by statute of the nation where the subject bank was chartered and is domiciled.

The District Court cited *California Bankers Assoc. v. Shultz,* 416 U.S. 21 (1974) in support of its refusal to permit Payner to claim Fourth Amendment protection. In that case the California Bankers Association sought to restrain enforcement of the Bank Secrecy Act of 1970 which required banks to keep certain records of depositors' transactions and to furnish such to the Secretary of the Treasury as requested. The claim was that the record keeping practices violated Fourth Amendment rights of depositors. This Court upheld the Treasury regulations requiring the keeping of such records. That decision, however, in no way affects the outcome of this case. As soon as those regulations were issued, no depositor in any United States bank could have a reasonable expectation of privacy of his bank records.

With respect to the records of a depositor in the Castle Bank and Trust Company of the Bahamas on the other hand, the laws of the Bahamas provided full secrecy and confidentiality and there was nothing illegal or improper for an American citizen to maintain such an account. Therefore, a depositor had a reasonable and legitimate expectation of complete privacy. The Government's criminal acts in obtaining such records violated Respondent's legitimate expectation of privacy under both *Katz* and *Rakas* and, accordingly, made the fruits of that criminal conduct inadmissible at trial against Respondent.

CONCLUSION

Based upon its inherent Supervisory Powers, and the Due Process Clause of the Fifth Amendment to the United States Constitution, as well as the Fourth Amendment to the United States Constitution, the District Court had adequate authority to refuse to permit the introduction of evidence obtained in bad faith by willful and knowing criminal acts of Government agents. Respondent accordingly respectfully requests that this Court affirm the Judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

CONSTITUTION AND STATUTES INVOLVED

United States Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Florida Statutes Annotated §777.011

Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether

he is or is not actually or constructively present at the commission of such offense.

Florida Statutes Annotated §812.011

(1) "Property" means anything of value, including, but not limited to, real estate, tangible and intangible personal property, contract rights, evidences of debt, choses in action and other interests in or claims to wealth, admission or transportation tickets, animals, food and drink, transient accommodations at any public lodging establishment, and gas, water, and electric and other power and telephone service.

Florida Statutes Annotated §812.021(1)(a)

(1) A person who with intent unlawfully to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any other than the true owner, any property;

* * * * *

Florida Statutes Annotated §812.021(5)

It shall be sufficient for any indictment, information, or warrant returned, filed, or issued under this section to charge generally that the defendant, at the time and in the county specified, did steal the personal or real property,

thing in action, evidence of debt or contract, or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. It shall not be necessary when alleging the larceny of property over a period of time that the exact date or dates the property was taken be alleged, but instead the total period of time may be alleged generally. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same.

Florida Statutes Annotated §812.081

(1) As used in this section and §812.091:

(a) "Article" means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, map or copy thereof.

(b) "Representing" means completely or partially describing, depicting, embodying, containing, constituting, reflecting, or recording.

(c) "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improve-

ment thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;

2. Of value;

3. For use or in use by the business; and

4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(d) "Copy" means any facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

(2) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

(3) In a prosecution for a violation of the provisions of this section, it is no defense that the person so charged returned or intended to return the article so stolen, embezzled, or copied.

Statute Law of the Bahama Islands (1789-1915), The Banks Act; Chapter 96.9 (1909)

A bank shall from time to time, if required by the Governor, furnish to the Governor a special return and such further information as the Governor may reasonably see fit to call for:

Provided that the bank shall not, nor shall anything herein contained be construed to authorize a bank to, make known the private account or accounts of any person whatever having dealings with the bank.

Federal Rules of Evidence, Rule 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.